Comments

Is There Something Suspicious About the Constitutionality of Loitering Laws?

I. Introduction

"[T]he need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation"[1] is greater than ever. Laws directed at crime prevention are an essential weapon in the lawmakers' arsenal. Such laws are, however, some of the most difficult to enact and enforce because they raise a number of constitutional and practical concerns. These concerns revolve in large part around the amount of discretion given law enforcement officers and courts in determining what behavior should be labeled criminal and the time when it is appropriate to intervene in potentially criminal activity.

Laws against inchoate crimes like attempt, solicitation, and conspiracy are commonly used in the effort to prevent criminal activity. Their enforceability and constitutionality are for the most part well settled. The discretion afforded law enforcement officers, prosecutors, and juries in the enforcement of loitering laws, however, lends itself to abuse. Thus, loitering statutes and ordinances are probably the most controversial laws used to prevent crime.

This Note will first examine the historical and constitutional background of loitering laws by considering an ancestor of modern loitering laws, the vagrancy law.[2] To better understand the potential practical concerns underlying the enforcement of various types of loitering laws, this Note will go on to consider how laws against attempted crimes, solicitation, and conspiracy are enforced.[3] Four of the more common types of modern loitering laws will then be examined.[4] This Note will demonstrate that while loitering laws serve a valuable function in the war against crime, courts and legislatures must confine the scope of these laws to the limitations mandated by the Constitution.

II. Vagrancy Laws

The English vagrancy laws that were the precursor of American vagrancy laws were first instituted for economic reasons.[5] As the feudal system began to deteriorate, laborers began to leave their fiefs to find other higher paying jobs. Among the first responses to the resulting labor shortage were laws compelling laborers to remain in

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1. Kolender v. Lawson, 461 U.S. 352, 361 (1983).
2. *See infra* notes 5–21 and accompanying text.
3. *See infra* notes 22–34 and accompanying text.
4. *See infra* notes 35–144 and accompanying text.
5. Papachristou v. City of Jacksonville, 405 U.S. 156, 161 n.4 (1972); Note, *Homelessness in a Modern Urban Setting*, 10 Fordham Urb. L. Rev. 749, 754 n.16 (1982) [hereinafter Note, *Homelessness*].

fixed areas.[6] These laws eventually evolved into a means of crime prevention and were aimed at restricting those who supported themselves through the commission of illegal acts on rural highways.[7] When these laws finally made their way to early America, they did so under "the theory that society must have a means of removing the idle and undesirable from its midst before their potential for criminal activity is realized."[8]

In modern times, vagrancy laws have been challenged primarily on two different bases. First, such laws have been contested on the ground that they are beyond the states' police power. States generally have the power to enact laws that protect public health, safety, and morals, and such laws need only have a reasonable connection to these ends. But when the connection to crime prevention has been tenuous, vagrancy laws have been struck down.[9]

Vagrancy laws have also been effectively challenged on the basis that they are constitutionally void for vagueness under the due process clauses of the fifth and fourteenth amendments. The void-for-vagueness test requires that a law give people of ordinary intelligence the opportunity to know what is prohibited, so that they may act accordingly,[10] and that the law provide explicit standards to prevent arbitrary enforcement.[11] The United States Supreme Court has commented that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[12]

Of the two prongs of the void-for-vagueness test, the Supreme Court has held that the second, relating to the establishment of minimal guidelines, is the more important.[13] The Court has also called for a more stringent vagueness test where the

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6. Note, *Homelessness*, *supra* note 5.

7. *Id.* at 754 n.17.

8. *Id.* at 756. Historically, loitering statutes also had their origins in English law and "were often incorporated within vagrancy statutes because the concepts of loitering and vagrancy overlapped." *Id.* at 758.

9. *See, e.g.*, Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967), which held that the New York vagrancy statute

> constitutes an overreaching of the proper limitations of the police power in that it unreasonably makes criminal and provides punishment for conduct (if we can call *idleness* conduct) of an individual which in no way impinges on the rights or interests of others and which has in no way been demonstrated to have anything more than the most tenuous connection with prevention of crime and preservation of the public order . . . other than, perhaps, as a means of harassing, punishing or apprehending suspected criminals in an unconstitutional fashion.

Id. at 312–313, 20 N.E.2d at 428, 282 N.Y.S.2d at 742.

10. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); *see also* Kolender v. Lawson, 461 U.S. 352, 357 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921); International Harvester Co. v. Kentucky, 234 U.S. 216, 223–24 (1914); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 217 (1967) [hereinafter Amsterdam].

11. *Grayned*, 408 U.S. at 108–09; *see also Kolender*, 461 U.S. at 357; *Papachristou*, 405 U.S. at 162; Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940); Herndon v. Lowry, 301 U.S. 242, 263 (1937); Amsterdam, *supra* note 10, at 217.

12. *Grayned*, 408 U.S. at 108.

13. *Kolender*, 461 U.S. at 358.

questioned law "threatens to inhibit the exercise of constitutionally protected rights."[14]

The Supreme Court's most important pronouncement on the void-for-vagueness test as it applies to vagrancy laws is its decision in *Papachristou v. City of Jacksonville*.[15] The Court held that a law prohibiting vagrancy and listing several broad categories of people who may be considered vagrant for purposes of the law violated both prongs of the void-for-vagueness test and was therefore invalid.[16] With respect to the lack of notice given to potential offenders, the Court noted that the ordinance made acts normally looked upon as innocent into criminal acts.[17] Thus the ordinance made it difficult for citizens to recognize that their actions may be subject to criminal penalties. The Court also went so far as to attack the law on the ground that it criminalized "activities . . . historically part of the amenities of life as we have known them."[18] It then asserted that the vagrancy law, by permitting arrest on suspicion of past or future criminality, placed virtually "unfettered discretion" in the hands of the police.[19] The Court concluded that the true danger in the promulgation of vagrancy laws which lack standards to govern the exercise of discretion is that such laws furnish

> a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk . . . only at the whim of any police officer."[20]

The concerns raised in the Supreme Court's disposition of the *Papachristou* case are repeatedly cited by other courts in their evaluations of loitering statutes.[21]

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14. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); *Grayned*, 408 U.S. at 109.

15. 405 U.S. 156 (1972).

16. At the time of the defendant's arrest and conviction, Jacksonville Ordinance Code §§ 26-57 provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

JACKSONVILLE, FLA. ORDINANCE CODE §§ 26-57, *cited in Papachristou*, 405 U.S. at 156 n.1.

17. *Papachristou*, 405 U.S. at 163.

18. *Id.* at 164.

19. *Id.* at 168.

20. *Id.* at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) and Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).

21. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 360-61 (1983); Sawyer v. Sandstrom, 615 F.2d 311, 316-17 (5th Cir. 1980); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1172-74 (2d Cir. 1974); Waters v. McGuriman, 656 F. Supp. 923, 925-27 (E.D. Pa. 1987); Johnson v. Carson, 569 F. Supp. 974, 976 (M.D. Fla. 1983); People v. Superior Court (Caswell), 46 Cal. 3d 381, 391, 758 P.2d 1046, 1050, 250 Cal. Rptr. 515 (1988); *In re* Frank O., 201 Cal. App. 3d 1041, 1045, 247 Cal. Rptr. 655, 658 (1988); Bullock v. City of Dallas, 248 Ga. 164, 167, 281 S.E.2d 613, 615 (1981); Coleman v. City of Richmond, 5 Va. App. 459, 466-67, 364 S.E.2d 239, 242 (1988); People *ex rel.* C.M., 630 P.2d 593, 595-97 (Colo. 1981); City of Milwaukee v. Wilson, 96 Wis. 2d 11, 18, 291 N.W.2d 452, 457 (1980).

III. Inchoate Crimes

Attempt laws and laws prohibiting solicitation and conspiracy do not contend with the same constitutional infirmities as loitering laws, but the requirements for arrest and conviction under these laws point out the practical problems in enforcing the most common types of loitering laws.

A. *Attempt*

Like laws prohibiting loitering, the crime of attempt provides a means for law enforcement officers to intervene under certain circumstances in time to prevent the commission of a completed crime.[22] A basic tenet of attempt law, as is true in all criminal law, is that bad thoughts alone do not rise to the level of a crime. While courts differ as to what act is required to make out a charge for attempt, they agree that "more than an act of preparation must occur."[23] For instance, some courts have required that an indispensable step in the commission of the principal crime be undertaken.[24] Others have required that the act be physically proximate to the intended crime. In holding that defendants who tried unsuccessfully to find a bank messenger whom they intended to rob could not be found guilty of attempted robbery, the Court of Appeals of New York noted by way of analogy that "[n]either would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person whom he had planned to kill but could not find him."[25]

Another standard employed is the probable desistance approach, which requires that the act undertaken must be one from which it is unlikely the actor would turn back if not for some form of intervention. A commentator explained the rationale behind this approach:

> [T]he defendant's conduct must pass that point where most men, holding such an intention as the defendant holds, would think better of their conduct and desist. All of us . . . at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. . . . [B]ut most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens. The few who do not and pass beyond that point are, if the object of their conduct is not achieved, guilty of a criminal attempt.[26]

Under the equivocality approach, the act required must be clear evidence of the criminal intent. As explained by the Supreme Court of California in *People v. Miller*,[27] "[t]he reason for requiring evidence of a direct act, however slight, toward consummation of the intended crime, is . . . that in the majority of cases up to that time the conduct of the defendant, consisting merely of acts of preparation, has never ceased to be equivocal. . . . [S]o long as the equivocal quality remains, no one can

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22. W. LaFave & A. Scott, Jr., Criminal Law 498 (2d ed. 1986).

23. *Id.* at 504.

24. Where a defendant was charged with attempting a scheme to defraud an insurance company by having the named beneficiary file a false claim, one court stated that "it would be indispensable that the beneficiary file the claim or at least agree to file it." *Id.* at 505. *See In re* Schurman, 40 Kan. 533, 20 P. 277 (1889).

25. People v. Rizzo, 246 N.Y. 334, 158 N.E. 888, 889 (1927).

26. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. Pitt. L. Rev. 308, 309–10 (1937).

27. 2 Cal. 2d 527, 42 P.2d 308 (1935).

say with certainty what the intent of the defendant is."[28] Finally, the Model Penal Code requires "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime."[29]

Common to each interpretation of attempt law, regardless of what precise act is required, is the underlying requirement that the act must be highly indicative of the actor's intent to commit a specific crime. This is so because in most cases intent must be inferred from the conduct of the actor. In contrast, the only *actus reus* specified in most loitering laws is the act of loitering, which without more cannot be constitutionally prohibited.[30] This being so, law enforcement officers and courts often have unbridled discretion to determine whether the actor has engaged in conduct sufficient to constitute a violation of a loitering statute or ordinance.

B. *Solicitation and Conspiracy*

Both solicitation and conspiracy laws help prevent the fruition of criminal activity by giving law enforcement officers a tool, which they may use to intervene at the earliest stages of a plan to commit a crime, allowing them to act once the intent to commit the crime has been communicated. Conspiracy laws prohibit agreements to commit criminal acts. They are concerned with the special danger associated with group activity: "A conspirator who has committed himself to support his associates may be less likely to violate this commitment than he would to revise a purely private decision."[31] The threat to public safety from soliciting others to commit crime is similarly deemed to be more dangerous than when an individual acts alone because it may lead to the same sort of cooperation that conspiracy law is directed at preventing.[32]

The theory underlying laws against solicitation and conspiracy is that a person who has solicited another to commit a criminal act or has agreed with others to commit a criminal act has manifested her concrete intent to commit a crime. Like attempt laws, conspiracy and solicitation laws allow arrest and conviction on the basis of a prediction that criminal activity is imminent. The act beyond mere preparation (as required in attempt law) or some communication of the intent to commit a proscribed act (as required in solicitation and conspiracy law) is deemed to be a reliable predictor of future harm to persons or property.[33] Under such an analysis, loitering laws, at least in theory, present a sharp contrast to these crimes because of

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28. *Id.* at 531–32, 42 P.2d at 310.

29. MODEL PENAL CODE § 5.01(1)(c) (1980).

30. Papachristou v. City of Jacksonville, 405 U.S. 156, 163–64 (1972); Territory of Hawaii v. Anduha, 48 F.2d 171, 172 (9th Cir. 1931); Commonwealth v. Carpenter, 325 Mass. 519, 519–21, 91 N.E.2d 666, 666–67 (1950); People v. Diaz, 4 N.Y.2d 469, 469–72, 151 N.E.2d 871, 871–72, 176 N.Y.S.2d 313, 313–15 (1958).

31. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 924 (1959).

32. W. LAFAVE & A. SCOTT, JR., *supra* note 22, at 488. *See also* Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 621–22 (1961).

33. Note, *Loitering and Related Offenses*, 4 HARV. C.R.-C.L. L. REV. 275, 282–83 (1968).

the difficulty of predicting a person's ultimate future conduct merely from the fact that he or she is "lingering, standing idly, or moving slowly about."[34]

IV. Recent Cases Addressing the Validity of Loitering Laws

A. In re Frank O.[35]

In *In re Frank O.*, a California court of appeals addressed a juvenile curfew ordinance closely connected with the once common vagrancy law. Like vagrancy laws, the Long Beach curfew ordinance challenged in *Frank O.* dealt with "idlers," but only those below the age of eighteen.[36] The ordinance provided that:

> No person under the age of eighteen years shall loiter about any public place, as defined in Section 9.02.090, between the hours of ten p.m. and the time of sunrise of the following day when not accompanied by his parent or legal guardian having legal custody and control of such person, or spouse of such person over twenty-one years of age.[37]

The court looked at three possible interpretations of the ordinance. First, it considered an interpretation of the ordinance that would prohibit mere presence of a minor in any public place between ten p.m. and sunrise unless accompanied by a parent, guardian, or spouse over the age of twenty-one years.[38] The court concluded that taken literally, the ordinance would subject to arrest minors coming home from a movie or the library, or even a minor walking his grandmother home at night. This construction, said the court, would be "unreasonable . . . [and] absurd."[39] Furthermore, "mere presence" ordinances, even as applied to juveniles, have been held unconstitutional as "'an arbitrary invasion of . . . inherent personal rights' and lack 'any real or substantial relationship to the primary purpose' of promoting the welfare of juveniles."[40] Second, the court considered whether the Long Beach curfew ordinance prohibited "lingering about for the purpose of committing a crime as opportunity may be discovered unless accompanied by an adult of the requisite relationship similarly disposed to criminal activity."[41] While the court found that this might be a constitutional reading of the ordinance, it also found that to construe the law in this manner would be to virtually rewrite the ordinance.[42] The court therefore settled on an interpretation that prohibited "innocent, aimless lingering about unless

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34. Black's Law Dictionary 849 (5th ed. 1979). *See also* People v. Smith, 75 Mich. App. 64, 67–68, 254 N.W.2d 654, 656 (1977); City of Seattle v. Drew, 70 Wash. 2d 405, 409, 423 P.2d 522, 524 (1967). *But see* People v. Teresinski, 30 Cal. 3d 822, 830, 640 P.2d 753, 757, 180 Cal. Rptr. 617, 621 (1982).

35. 201 Cal. App. 3d 1041, 247 Cal. Rptr. 655 (1988).

36. *Id.* at 1044, 247 Cal. Rptr. at 657.

37. Long Beach, Cal., Ordinances C-5938 § 1 (1983), *cited in In re* Frank O., 201 Cal. App. 3d at 1044, 247 Cal. Rptr. at 656–57.

38. *In re* Frank O., 201 Cal. App. 3d at 1044, 247 Cal. Rptr. at 657.

39. *Id.*

40. *Id.* at 1045, 247 Cal. Rptr. at 657 (quoting Alves v. Justice Court, 148 Cal. App. 2d 419, 425, 306 P.2d 601, 605 (1957)).

41. *In re* Frank O., 201 Cal. App. 3d 1041, 1044, 247 Cal. Rptr. 655, 657 (1988).

42. *Id.* at 1045, 247 Cal. Rptr. at 657.

with an adult idler of the requisite relationship,"[43] or, as the trial court defined it, "presence without any purpose."[44]

While recognizing that a prohibition against aimless stops and purposeless lingering as applied to adults may infringe on constitutionally protected activities,[45] the *Frank O.* court noted that other courts have held that juveniles may be denied the right to take part in these activities "for their own protection and to reduce juvenile crime."[46] Rather than assess whether these are constitutionally valid interests supporting infringement on the rights of juveniles, the court struck down the law for vagueness in that it provided neither fair notice of what conduct is prohibited nor standards of enforcement that would prevent arbitrary and discriminatory enforcement.[47]

In evaluating the ordinance's failure to provide fair notice, the court noted that while the ordinance did not and could not prohibit "mere presence" under the specified circumstances, it failed to reveal what more than mere presence is required to find a violation.[48] "Presence without *any* purpose," as the trial court interpreted the ordinance to prohibit, "may be a physical impossibility."[49] Under this interpretation, the California Court of Appeals questioned whether presence for an *unlawful* purpose would take the juvenile outside the scope of the prohibition.[50]

It also questioned the validity of an interpretation that would allow arrest if the loiterer was "without any lawful purpose."[51] In *Papachristou v. City of Jacksonville*,[52] the United States Supreme Court expressed its concern that "[t]he qualification 'without any lawful purpose or object' may be a trap for innocent acts."[53] Similarly, in *City of Portland v. James*,[54] the Supreme Court of Oregon found that a city ordinance that prohibited roaming the streets between specified hours "without having a lawful purpose" or, as the court interpreted this language, "with an unlawful purpose," permitted arrest on suspicion and was void for vagueness.[55] Notwithstanding these difficulties, the *Frank O.* court also found that the ordinance failed to define "aimless idle stops and pauses and purposeless distraction"[56] so that minors will know how long they may stop and how long they may be distracted.[57] Under these circumstances, the court held that the ordinance

43. *Id.* at 1044, 247 Cal. Rptr. at 657.
44. *Id.* at 1045, 247 Cal. Rptr. at 657–58.
45. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).
46. *In re* Frank O., 201 Cal. App. 3d 1041, 1045, 247 Cal. Rptr. 655, 658 (1988).
47. *Id.* at 1046, 247 Cal. Rptr. at 658.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. 405 U.S. 156 (1972).
53. *Id.* at 164.
54. 251 Or. 8, 444 P.2d 554 (1968).
55. *Id.* at 9–10, 444 P.2d at 555–57.
56. *In re* Frank O., 201 Cal. App. 3d 1041, 1046–47, 247 Cal. Rptr. 655, 658 (1988).
57. *Id.* at 1047, 247 Cal. Rptr. at 658.

failed to provide notice sufficient to satisfy fourteenth amendment due process requirements.[58]

The *Frank O.* court further found that the ordinance failed to provide guidelines sufficient to prevent arbitrary and discriminatory enforcement of the law.[59] Because the ordinance did not reveal what more than "mere presence" in public at the stated hours was necessary for violation, it permitted "the police to define the crime to fit the defendant's conduct . . . ."[60] The ordinance also allowed arrests on suspicion rather than probable cause "by making otherwise innocent behavior criminal and allowing the officer to determine probable cause through the power to define the crime."[61] As such, the court held that the Long Beach juvenile curfew ordinance also failed the second prong of the void-for-vagueness test and violated the due process requirements of the fifth and fourteenth amendments.

Most broad loitering statutes and ordinances are struck down on grounds similar to those expressed in *In re Frank O.*. More importantly, these concerns arise even in laws that are fashioned in a genuine attempt to avoid vagueness by legitimately narrowing the scope of the statute or ordinance.

B. People v. Bright[62]

The Court of Appeals of New York addressed a very different type of loitering law in *People v. Bright*. New York Penal Law section 240.35(7) stated that one is guilty of a violation if he "[l]oiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence."[63] A "transportation facility" was defined as:

> any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.[64]

The defendants claimed that the statute was void for vagueness for several reasons. Despite limiting the scope of the law to "transportation facilities" as defined, the statute nonetheless failed to give clear notice of the prohibited act. In addition, the "satisfactory explanation" requirement contained no standards for enforcement. The defendants further challenged the validity of the statute on the ground that requiring a person suspected of violating the statute to provide a "satisfactory explanation" or face arrest was a violation of the fifth amendment prohibition on compelled testimony. The court agreed with the defendants and found the law unconstitutional.[65]

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58. *Id.* at 1046, 247 Cal. Rptr. at 658.
59. *Id.* at 1047, 247 Cal. Rptr. at 659.
60. *Id.* at 1048, 247 Cal. Rptr. at 659; *see also* Kolender v. Lawson, 461 U.S. 352, 360 (1983).
61. *In re* Frank O., 201 Cal. App. 3d 1041, 1048, 247 Cal. Rptr. 655, 660 (1988).
62. 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988).
63. N.Y. PENAL LAW § 240.35(7), *cited in Bright*, 71 N.Y.2d at 378, 520 N.E.2d at 1356, 526 N.Y.S.2d at 67.
64. N.Y. PENAL LAW § 240.00(2), *cited in Bright*, 71 N.Y.2d at 382, 520 N.E.2d at 1357, 526 N.Y.S.2d at 68–69.
65. *Bright*, 71 N.Y.2d at 378–79, 520 N.E.2d at 1356, 526 N.Y.S.2d at 66.

Although legislators cannot prohibit mere loitering,[66] it has been said that where "a specific facility is one of limited size or knowable boundary which is open to the public, if at all, for limited, narrow and clearly defined purposes which forewarn the criminal actor of the prohibited conduct by its restricted public nature,"[67] loitering in such a facility may be prohibited. Under these circumstances, law enforcement officers' discretion in enforcing the law is limited to the confines of a facility "where illegal activity . . . [is] notorious."[68] On these grounds, laws addressing loitering on school premises,[69] in parks,[70] and upon waterfront facilities[71] have all been upheld in the face of vagueness challenges.

The court in *People v. Bright*, however, found that " 'transportation facility' was defined in such a broad, all-encompassing manner as to include some facilities that are more analogous to a public street than to a specific area of restricted public access that gives notice of its prohibition against loitering."[72] The court recognized that in the twenty-five years since it last addressed the language of this law[73] many transportation facilities had developed into "small, indoor cit[ies]."[74] Thus, the court held, a "transportation facility" must be looked upon as a public place; the definition did not satisfy due process because it failed to give unequivocal warning to the public "that an activity as innocuous as mere loitering [was] prohibited."[75] The court also held that the provision permitting arrest unless the person provided a "satisfactory explanation of his presence"[76] was similarly void for vagueness. In assessing the validity of this requirement, the court looked to the United States Supreme Court's decision in *Kolender v. Lawson*.[77]

In *Kolender* the Court held a requirement that a person provide "credible and reliable" identification under California's request-for-identification law[78] void for vagueness on the ground that it "encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the

66. *See supra* notes 39–40 and accompanying text.

67. People v. Velazquez, 77 Misc. 2d 749, 756, 354 N.Y.S.2d 975, 982 (1974).

68. People v. Bright, 71 N.Y.2d 376, 384, 520 N.E.2d 1355, 1359, 526 N.Y.S.2d 66, 70 (1988).

69. *See* Annotation, *Validity and Construction of Statute or Ordinance Forbidding Unauthorized Persons to Enter Upon or Remain in School Building or Premises*, 50 A.L.R.3d 340 (1973).

70. Peters v. Breier, 322 F. Supp. 1171 (E.D. Wis. 1971).

71. People v. Merolla, 9 N.Y.2d 62, 172 N.E.2d 541, 211 N.Y.S.2d 155 (1961).

72. People v. Bright, 71 N.Y.2d 376, 386, 520 N.E.2d 1355, 1360–61, 526 N.Y.S.2d 66, 71–72 (1988).

73. People v. Bell, 306 N.Y. 110, 115 N.E.2d 821 (1953).

74. *Bright*, 71 N.Y.2d at 387, 520 N.E.2d at 1361, 526 N.Y.S.2d at 72.

75. *Id.*

76. N.Y. PENAL LAW § 240.35(7), *cited in Bright*, 71 N.Y.2d at 378, 520 N.E.2d at 1356, 526 N.Y.S.2d at 67.

77. 461 U.S. 352 (1983).

78. California Penal Code Ann. § 647(e) provided that:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

CAL. PENAL CODE ANN. § 647(e) (West 1970), *cited in Kolender*, 461 U.S. at 353 n.1. In People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), the California Court of Appeals interpreted the identification requirement so as to require that a person, when requested, produce "credible and reliable" identification, defined by the court as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.* at 438, 108 Cal. Rptr. at 872.

statute."[79] Similarly, the court in *Bright* held that because the statute provided no description of what a "satisfactory explanation" must include, the determination was "left entirely up to the policeman on the scene without any legislative guidance whatsoever, and render[ed] the statute unconstitutional."[80]

Identification or "explanation of presence" requirements can play a valuable role in law enforcement. Should a crime be committed in an area where a suspicious person was seen earlier, knowledge of the identity of that person could help in the investigation of that crime since it is possible that the person was either involved in the crime or witnessed some unusual activity after the police had gone. Allowing police to ask questions of suspicious people, even if the questions are not answered, can also aid in crime prevention by warding off potential criminals from a particular area. All these aims, however, can be accomplished through a stop under the guidelines specified by the United States Supreme Court in *Terry v. Ohio*.[81] There is one significant difference between a *Terry*-stop and a stop under the statute addressed by the court in *Bright* and others like it. Under these loitering statutes an *arrest* can be made on the basis of a person's answers to questions posed by the police or the person's failure to answer such questions, even if the answers to these questions would not furnish probable cause to believe the person has committed some crime. This distinction was also addressed by the court in *Bright*.[82]

The *Bright* court acknowledged that under *Terry* a police officer may, under certain circumstances, stop a person and ask questions. However, the court recognized that not only is a suspect under no obligation to respond to questions, but also that both the fifth amendment of the federal Constitution and the New York State Constitution permit a person to remain silent without suffering criminal sanctions for doing so.[83] The court found that the statute violated these constitutional rights by giving people the option of either exercising their constitutional rights and facing certain arrest, or waiving this right in an attempt to avoid arrest.[84]

The court's conclusion seems to be the correct one under the circumstances. Although the court failed to distinguish the "satisfactory explanation" requirement as a substantive or procedural element of the crime,[85] it appears clear from the wording of the law that a violation of the statute requires a showing that the accused was

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79. *Kolender*, 461 U.S. at 361.

80. People v. Bright, 71 N.Y.2d 376, 385, 520 N.E.2d 1355, 1360, 526 N.Y.S.2d 66, 71 (1988); *see also* Amsterdam, *supra* note 10, at 221.

81. 392 U.S. 1 (1968). *Terry* provides that notwithstanding the fourth amendment restrictions on searches and seizures, a police officer with reasonable suspicion of criminal activity may investigate by stopping a suspect and asking him or her questions as long as the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

82. *Bright*, 71 N.Y.2d at 384–86, 520 N.E.2d at 1359–61, 526 N.Y.S.2d at 70–71.

83. As Justice White said in his concurrence to *Terry v. Ohio*:

> [Under a *Terry*-stop] the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Terry, 392 U.S. at 34; *see also* Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1968).

84. *Bright*, 71 N.Y.2d at 385–86, 520 N.E.2d at 1360, 526 N.Y.S.2d at 71.

85. *Id.* at 384–85, 520 N.E.2d at 1359–60, 526 N.Y.S.2d at 70–71.

unable to give a satisfactory explanation of her presence. As such, the statute appears to impinge on fifth amendment rights.

It should be noted, however, that the United States Supreme Court has failed to address whether a requirement that one identify herself or account for her presence violates any constitutional rights. In *Kolender v. Lawson*, the majority expressly refused to address this question.[86] Justice Brennan did, however, address this issue and his concurrence in *Kolender*[87] forms much of the basis for the *Bright* court's disposition of the case.

C. Watts v. State[88]

Florida's general loitering and prowling statute was recently challenged and upheld by the Florida Supreme Court in *Watts v. State*. The law, based on the Model Penal Code's loitering and prowling law, provides:

> (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
>
> (2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight . . . makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.
>
> (3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.[89]

This statute was first construed by the Florida Supreme Court in *State v. Ecker*.[90] The court interpreted the words "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity" to mean "those circumstances where the peace and order are threatened or

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86. The majority in *Kolender v. Lawson* stated:

> Because we affirm the judgment of the court below on [the question of the vagueness of the "credible and reliable" identification requirement] . . ., we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. The remaining issues raised by the parties include whether section 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems.

Kolender v. Lawson, 461 U.S. 352, 361–62 n.10 (1983) (citations omitted).

87. *Id.* at 362–69.

88. 463 So. 2d 205 (Fla. 1985).

89. FLA. STAT. § 856.021 (1981), *cited in Watts*, 463 So. 2d at 205 n.1.

90. 311 So. 2d 104 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975).

where the safety of persons or property is jeopardized."[91] The court, adopting the language of the United States Supreme Court in *Terry v. Ohio*,[92] also held that to make an arrest under the statute, " 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant' a finding that a breach of the peace is imminent or the public safety is threatened."[93]

In *Watts v. State*, the Supreme Court of Florida reaffirmed its decision in *Ecker* while upholding the loitering statute that was being challenged in light of the United States Supreme Court's decision in *Kolender v. Lawson*.[94] The *Watts* court distinguished the Florida loitering law from the California statute challenged in *Kolender* by noting that failure to identify oneself was not an element of the crime under the Florida law, but was under the California statute.[95] Instead, "a person's identification or refusal to identify is merely a circumstance to consider in deciding whether the public safety is threatened."[96]

The distinction, while noteworthy, is not necessarily valid. While an arrest under the Florida statute cannot be based *solely* on failure to properly identify oneself, the *Watts* court intimated that an arrest might nonetheless *hinge* on such a failure.[97] Therefore, it would seem that the fourteenth amendment's due process requirement as construed by the United States Supreme Court in *Kolender v. Lawson* mandates that the type of identification sufficient under the Florida statute be specified.[98]

Even without making this distinction, courts have held that laws similar to that in *Watts v. State* are void for vagueness because they fail to clarify what types of identification or explanation of one's conduct might be sufficient.[99] "[A] mere opportunity to identify and explain, without a clarifying standard to guide the police officer's discretionary assessment of the account a suspect provides, does not prevent arbitrary and discriminatory law enforcement."[100] These statutes specify that "if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm,"[101] then the actor may not be convicted, but this cannot compensate the accused for the trouble he suffered as a result of his arrest, booking, time spent in jail, and trial.

The vagueness problems with these Model Penal Code-based loitering provisions,[102] however, go much deeper than either the above discussion or the

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91. *Id.* at 109; *see also* Bell v. State, 252 Ga. 267, 271–72, 313 S.E.2d 678, 681 (1984).

92. 392 U.S. 1 (1968).

93. *Ecker*, 311 So. 2d at 109 (quoting *Terry*, 392 U.S. at 21).

94. 461 U.S. 352 (1983); *see supra* notes 74–77 and accompanying text.

95. Watts v. State, 463 So. 2d 205, 206–07 (Fla. 1985).

96. *Id.* at 207. The court noted, however, that in *State v. Ecker* it held that lack of proper identification, without any other circumstances suggesting alarm for the safety of persons or property, would not create a sufficient basis for an arrest under the statute. *Id.* at 206.

97. *Id.* at 207.

98. Kolender v. Lawson, 461 U.S. 352, 358 (1983).

99. Fields v. City of Omaha, 810 F.2d 830, 833–34 (8th Cir. 1987); City of Bellevue v. Miller, 85 Wash. 2d 539, 546–47, 536 P.2d 603, 608 (1975).

100. *Fields*, 810 F.2d at 834.

101. MODEL PENAL CODE § 250.6 (1980).

102. The Model Penal Code provides:

opinions in *Watts* and *Ecker* suggest. General loitering and prowling laws along the lines of Model Penal Code section 250.6 have often been challenged for vagueness. The primary basis for these challenges has been the failure of these laws to establish standards for assessing what behavior or circumstances warrant alarm. As one court explained,

> [a] determination of whether particular activity manifests an unlawful purpose or creates alarm is entirely dependent upon a police officer's opinion, not only with respect to what conduct the ordinance prohibits, but also with respect to the suspected import of the activity observed. Such extravagant police discretion is plainly improper.[103]

Studies and other writings suggest that when police are given wide discretion such as that under the general loitering and prowling law, they are likely to abuse it. The reasons for abuse range from lack of proper training and guidance in assessing suspicious circumstances[104] to isolation from the community[105] to prejudices developed while on the police force.[106]

Furthermore, circumstances that may warrant alarm for public safety in one community do not necessarily warrant the same alarm in another. At best, such an enforcement limitation may work "to impose on the community values that have little relevance to people against whom they are enforced."[107] At worst, the enforcement limitation may have no substance at all and thereby "entrust[ ] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' "[108] By requiring that laws "provide explicit standards for those who apply them,"[109] the United States Supreme Court has sought to limit the abuses that may result when broad discretion is granted to those who enforce laws.

Underlying much of the criticism of the general loitering and prowling law is a sense that these laws permit arrest on suspicion of criminal activity rather than on

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section 250.6 Loitering or Prowling

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

MODEL PENAL CODE § 250.6 (1980).

103. *City of Bellevue*, 85 Wash. 2d at 544–45, 536 P.2d at 607.

104. L. TIFFANY, D. MCINTYRE & D. ROTHENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 38–43 (1967); W. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM AND MORALITY 155–60 (1970); Stormer & Bernstein, *The Impact of* Kolender v. Lawson *on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L.Q. 105, 112 (1984).

105. Skolnick, *A Sketch of the Policeman's "Working Personality,"* in CRIMINAL JUSTICE: LAW AND POLITICS 118, 123–25 (G. Cole 3d ed. 1980).

106. W. WESTLEY, *supra* note 104, at 160–65; Stormer & Bernstein, *supra* note 104, at 114.

107. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972); National Commission on the Causes and Prevention of Violence, *The Problem of "Overcriminalization,"* in CRIMINAL JUSTICE: LAW AND POLITICS 85, 97 (1976).

108. Smith v. Goguen, 415 U.S. 566, 575 (1974) (quoting Gregory v. Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring)).

109. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

probable cause as mandated under the fourth and fourteenth amendments.[110] Even when the scope of arrests under a Model Penal Code-based loitering law is limited by court construction that requires an officer "'to point to specific and articulable facts . . . [that] reasonably warrant' a finding that a breach of the peace is imminent or that public safety is threatened,"[111] an arrest must, by the terms of the law, be premised on suspicion that some crime other than loitering under the specified circumstances has been or will be committed by the accused. Courts have struck down a variety of vagrancy and loitering laws on the rationale that such laws permit arrest on suspicion.[112] Furthermore, the United States Supreme Court has expressed its fear that prosecutions under a vague vagrancy or loitering law "may be merely the cloak for conviction which could not be obtained on the real but undisclosed grounds for the arrest."[113] Where this is so, many courts find the challenged law unconstitutional. The *Watts* court and others that have upheld the Model Penal Code-based loitering and prowling ordinance have failed to take proper account of these considerations.

D. People v. Superior Court (Caswell)[114] *and* Coleman v. City of Richmond[115]

Laws that prohibit loitering with some specified illicit intent are probably the most common type of loitering laws and almost certainly the safest constitutionally. The United States Supreme Court has repeatedly "recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[116] Nonetheless, such laws have recently been challenged on the ground that they allow police, prosecutors, and courts too much discretion in determining whether the intent to commit the principal crime exists.

In *People v. Superior Court (Caswell)*,[117] the Supreme Court of California upheld a provision of the California Penal Code that provides: "[e]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (d) [One who] loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act."[118] The court

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110. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

111. State v. Ecker, 311 So. 2d 104 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975) (quoting Terry v. Ohio, 392 U.S. 1 (1968)).

112. Even the writers of the Model Penal Code were unsure whether those circumstances warranting "alarm" are significantly different from those warranting suspicion. MODEL PENAL CODE § 250.6, Commentary at 395–96 (1980). *See also* Kolender v. Lawson, 461 U.S. 352, 358 (1983); *Papachristou*, 405 U.S. at 159; Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1173 (1974); People v. Berck, 32 N.Y.2d 567, 573, 300 N.E.2d 33, 38, 347 N.Y.S.2d 33, 39 (1973); City of Portland v. James, 251 Or. 8, 14, 444 P.2d 554, 557 (1968); City of Bellevue v. Miller, 85 Wash. 2d 539, 546, 536 P.2d 603, 607–08 (1975); Amsterdam, *supra* note 10, at 220–28; Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 9 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1219–23 (1953).

113. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

114. 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988).

115. 5 Va. App. 459, 364 S.E.2d 239 (1988), *reh'g denied*, 6 Va. App. 296, 368 S.E.2d 298 (1988).

116. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); *see also* Colautti v. Franklin, 439 U.S. 379, 395 (1975); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952); Screws v. United States, 325 U.S. 91, 101–02 (1945) (plurality opinion).

117. 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988).

118. CAL. PENAL CODE § 647(d), *cited in Caswell*, 46 Cal. 3d at 390, 758 P.2d at 1049, 250 Cal. Rptr. at 518.

looked to the United States Supreme Court's disposition of cases involving laws that included a scienter requirement which had been challenged on vagueness grounds. The court then held that the statute provided adequate notice of the activity prohibited and that police discretion was restrained because the law could only be enforced against those who were in or about a public toilet with the required intent.[119]

The court pointed to several factors that law enforcement officers may consider to determine whether the requisite intent exists. These factors include whether the actor has, to the knowledge of the police officer, repeatedly solicited or committed lewd or lascivious acts in the same location in the past,[120] whether the officer has some reliable information from an informant as to the suspect's intent,[121] and whether the officer is notified by citizens who have used a restroom that the suspect was lingering inside while "engaging in suggestive conduct—not amounting to an actual solicitation or indecent exposure,"[122] but suggestive enough of the person's intent that the officer could find probable cause to arrest. In sum, the court held that police do not have unfettered discretion to define the crime of loitering under California Penal Code section 647(d), but instead that "a person is subject to arrest under the provision only if his or her conduct gives rise to probable cause to believe that he or she is loitering in or about a public restroom with the proscribed illicit intent."[123]

In *Coleman v. City of Richmond*,[124] the Court of Appeals of Virginia expressed a contrasting opinion about loitering laws that require a specific intent. The city ordinance at issue in *Coleman* provided:

> (a) It shall be unlawful for any person, within the city limits, to loiter, lurk, remain, or wander about in a public place, or in any place within view of the public or open to the public, in a manner or under circumstances manifesting the purpose of engaging in prostitution, or of patronizing a prostitute, or of soliciting for or engaging in any other act which is lewd, lascivious or indecent.
>
> . . . .
>
> (b) For the purposes of this section, a "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.[125]

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119. *Caswell*, 46 Cal. 3d at 390–400, 758 P.2d at 1049–56, 250 Cal. Rptr. at 518–25. The court noted that the use of the term "loiter" does not render the statute unconstitutionally vague because it had previously been interpreted by the Supreme Court of California to connote "'lingering in the designated places for the purpose of committing a crime as opportunity may be discovered.'" *Id.* at 390, 758 P.2d at 1049, 250 Cal. Rptr. at 518 (quoting *In re* Cregler, 55 Cal. 2d 308, 311–12, 363 P.2d 305, 307, 14 Cal. Rptr. 289, 291 (1961)). It also noted that the terms "lewd and lascivious" do not render the statute indefinite since they had previously been construed to "'refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct.'" *Caswell*, 46 Cal. 3d at 391–92, 758 P.2d at 1050, 250 Cal. Rptr. at 519 (quoting Pryor v. Municipal Court, 25 Cal. 3d 238, 256, 599 P.2d 636, 647, 158 Cal. Rptr. 330, 341 (1979)).

120. People v. Superior Court (Caswell), 46 Cal. 3d 381, 395, 758 P.2d 1046, 1053, 250 Cal. Rptr. 515, 522 (1988). The use of an accused's past acts to show his or her present intention is permitted under FED. R. EVID. § 404(b) and corresponding state rules of evidence.

121. *Id.* at 396, 758 P.2d at 1053, 250 Cal. Rptr. at 522.

122. *Id.*

123. *Id.* at 394, 758 P.2d at 1052, 250 Cal. Rptr. at 521.

124. 5 Va. App. 459, 364 S.E.2d 239, *reh'g denied*, 6 Va. App. 296, 368 S.E.2d 298 (1988).

125. RICHMOND, VA. CODE §§ 20–83, *cited in Coleman*, 5 Va. App. 459, 463–64, 364 S.E.2d 239, 242 (1988).

The ordinance also included several circumstances that may be considered in evaluating whether the prohibited purpose has been manifested.[126]

The court held that if the circumstances listed within the law were meant to be sufficient individually to manifest the prohibited intent, then the law was overbroad because it would deter a range of constitutionally protected activity,[127] including the unwritten rights to loiter, wander, and idle.[128] This reading of the law contrasts with many other courts' interpretations of other loitering statutes that list circumstances that "may be considered" in determining whether a violation has occurred. These courts hold that a list of this sort only provides examples of behavior that *might* be considered evidence of a violation of the law.[129] This seems to be the better view.

The court held alternatively in *Coleman* that if the listed circumstances were only included in the ordinance as investigative hints, then they were "not relevant to the constitutional inquiry as they ha[d] no force of law."[130] The court ruled, however, that under this interpretation the ordinance was still unconstitutional, this time for vagueness reasons.

The court's concerns were similar to those expressed by the Supreme Court of California in evaluating the statute at issue in *People v. Superior Court (Caswell)* and by many other courts in evaluating a variety of loitering laws: that loitering is not in itself illegal conduct,[131] that because no overt act is required, an officer may arrest "on mere suspicion of future criminality,"[132] and that establishing intent under the Richmond ordinance requires some overt act that would in itself be sufficient to prove a charge of solicitation or some other crime.[133] Therefore, said the court, there exist less restrictive constitutional means of addressing the problems confronted by the Richmond ordinance.[134]

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126. Among the circumstances which may be considered in determining whether any such purpose is manifested by a particular individual are the following: (i) that, to the knowledge of the arresting officer at the time of the arrest, such an individual has within one year prior to the date of arrest been convicted of any offense chargeable under this section, or under any other section of the Code or the Code of Virginia relating to prostitution, pandering, or any act proscribed as lewd, lascivious or indecent; (ii) that such individual repeatedly beckons to, stops, attempts to stop, or interferes with the free passage of other persons, or repeatedly attempts to engage in conversation with passersby or individuals in stopped or passing vehicles; or (iii) that such individual repeatedly stops or attempts to stop motor vehicle operators by hailing, waving arms, or other bodily gestures. No arrest shall be made for a violation of this section unless the arresting officer first affords such person an opportunity to explain the conduct in question, and no one shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose.

Id.

127. The court held that if the enumerated circumstances are sufficient in themselves to manifest the intent to engage in the proscribed acts "[t]he ordinance may force people to curb their freedom of expression and association or risk arrest." *Coleman*, 5 Va. App. at 465, 364 S.E.2d at 243. For instance, under such an interpretation a former prostitute could be arrested for window shopping, or a hitchhiker could be arrested for attempting to flag cars down. *Id.*

128. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); *see supra* notes 15–21 and accompanying text.

129. *See* Bell v. State, 252 Ga. 267, 271, 313 S.E.2d 678, 681 (1984).

130. Coleman v. City of Richmond, 5 Va. App. 459, 466, 364 S.E.2d 239, 243 (1988).

131. *Id.* at 464, 364 S.E.2d at 244.

132. *Id.*

133. *Id.* The Supreme Court of California addresses this issue in *People v. Superior Court (Caswell)* by stating that legislators are free to criminalize the same act in different manners. *Caswell*, 46 Cal. 3d 381, 395, 758 P.2d 1046, 1052–53, 250 Cal. Rptr. 515, 521–22 (1988).

134. *Coleman*, 5 Va. App. at 467, 364 S.E.2d at 243.

Although the Virginia Court of Appeals voiced legitimate concerns with respect to the challenged ordinance, the weight of authority and of policy considerations suggest that the court in *People v. Superior Court (Caswell)* correctly upheld the California loitering law in question. The "loitering with a specific intent" laws differ from the general loitering and prowling ordinances considered *supra*[135] in that they include a significant limit on the discretion of law enforcement officers, *i.e.*, the requirement that the person arrested harbor the specified purpose. This limitation is certainly more definite than one requiring that police find that a person is "without . . . a lawful purpose"[136] or that he or she loiters "under circumstances that warrant a justifiable and reasonable alarm"[137] for public safety.

While these laws may, to an extent, undermine the requirements of probable cause for arrest by redefining the crime, they do so in a very narrow scope, and usually address only those types of criminal conduct that are difficult to detect at any stage in their fulfillment, such as prostitution, lewdness, and the sale, use, or possession of narcotics.[138] Like attempt and solicitation laws, this type of loitering law provides police with a tool that may, under circumstances that rise to the level of probable cause, be an accurate predictor of future acts.[139] Of course, a suspect must undertake some sort of overt act that suggests his intent, but these loitering laws' failure to specify acts that manifest the proscribed intent is not a fatal constitutional flaw. "[D]ue process does not require 'impossible standards' of clarity,"[140] and where the loitering statute is as limited in scope as those addressed here, a list of distinct conduct that connotes the named specific intent might not only be impossible to produce, but would be an unnecessary limitation on police discretion.[141]

The United States Supreme Court decisions that recognize the validity of a scienter requirement in mitigating an otherwise vague law suggest that the same type of requirement can be effective in combatting the vagueness of a loitering law.[142] Further support for this notion comes from *D. v. Juvenile Department*,[143] in which the United States Supreme Court summarily dismissed for lack of a substantial federal question a challenge to an Oregon law similar to the ordinance considered in *Coleman v. City of Richmond*.[144] The summary dismissal of the case affirmed on the merits the Oregon Court of Appeals' decision upholding the challenged statute, suggesting that the United States Supreme Court presumes that a loitering law which includes a scienter requirement is a constitutionally valid exercise of a state's police power.

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135. *See supra* notes 88–113 and accompanying text.

136. City of Portland v. James, 251 Or. 8, 444 P.2d 554 (1968).

137. Watts v. State, 463 So. 2d 205, 205 n.1 (Fla. 1985).

138. *See* Annotation, *Statutes Prohibiting Loitering for the Purpose of Using or Possessing Dangerous Drugs*, 48 A.L.R.3d 1271 (1973).

139. *See* Note, *Loitering and Related Offenses*, *supra* note 33, at 282–83.

140. Kolender v. Lawson, 461 U.S. 352, 361 (1983) (quoting United States v. Petrillo, 332 U.S. 1, 7–8 (1947)).

141. This is especially true where the loitering law is limited not only through a specific intent requirement, but also through a limitation on the places where the law can be enforced, as in *People v. Superior Court (Caswell)*. *See Caswell*, 46 Cal. 3d 381, 399–400, 758 P.2d 1046, 1056, 250 Cal. Rptr. 515, 525 (1988).

142. *See supra* note 116 and accompanying text.

143. 434 U.S. 914 (1977).

144. *Id. See In re* D., 27 Or. App. 861, 557 P.2d 687 (1976), *review denied*, 278 Or. 1 (1977).

V. The Future of Loitering Laws

When sufficiently limited in scope, loitering laws can be an accurate and useful predictor of future criminality. When not sufficiently limited, these laws can and are used in a discriminatory and arbitrary fashion.[145] Thus, when drafting and construing laws prohibiting loitering, legislators and courts must be careful to recognize applicable constitutional limitations.

The broad Model Penal Code-based laws which prohibit loitering under circumstances that warrant alarm for the safety of property or persons[146] are probably the most useful of all modern loitering laws. They provide law enforcement officers with a tool to prevent crime in an unlimited number of situations. The very breadth of circumstances under which these laws might be invoked, however, suggests the constitutional infirmities of these prohibitions against loitering.

Studies show that police are more likely to use aggressive patrol tactics against minorities.[147] When minorities are found outside a minority neighborhood, their race may arouse a police officer's suspicion, even if their actions would warrant no alarm in a minority neighborhood.[148] Furthermore, behavior that might not be objectionable in one community may arouse suspicion in another. A loitering law that permits arrests for "suspicious" behavior or actions that "warrant alarm," but does not set guidelines restricting discretion in determining whether particular behavior violates the law, gives police nearly unlimited power to make arrests on the basis of prejudices or negative stereotypes. Courts must be careful not to condone such power.

Courts must also heed the United States Supreme Court's warnings against arrests based upon suspicion rather than probable cause.[149] Model Penal Code-based loitering laws such as that addressed in *Watts v. State*[150] sanction arrests based on alarm for the safety of persons or property. Regardless of how these laws are interpreted, they essentially permit police officers to make arrests when they merely suspect criminal activity.

By requiring that "a law enforcement officer shall, prior to any arrest for an offense . . . afford the actor an opportunity to dispel any alarm which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct,"[151] these loitering laws tacitly acknowledge that a police officer's prediction of future criminal conduct under a broad loitering law may be wholly inaccurate. In one sense, the inclusion of a "satisfactory explanation" clause helps validate the law. Not only does it guard against incorrect interpretations of the actor's

145. *See, e.g.*, *Kolender*, 461 U.S. 352 (1983); Fields v. City of Omaha, 810 F.2d 830 (1987); *In re* Frank O., 201 Cal. App. 3d 1041, 247 Cal. Rptr. 655 (1988).

146. Model Penal Code § 250.6 provides in part that "[a] person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." Model Penal Code § 250.6 (1980).

147. *See, e.g.*, M. Brown, Working the Street, Police Discretion and the Dilemmas of Reform 163–66 (1981).

148. *Id.* at 166; Stormer & Bernstein, *supra* note 104, at 116.

149. Papachristou v. City of Jacksonville, 405 U.S. 156, 164–65 (1972).

150. 463 So. 2d 205 (Fla. 1985).

151. Model Penal Code § 250.6 (1980); *see also* Fla. Stat. § 856.021 (1981), *cited in* Watts v. State, 463 So. 2d 205 n.1 (Fla. 1985); Ga. Code Ann. § 16-11-36, *cited in* Bell v. State, 252 Ga. 267, 268–69, 313 S.E.2d 678, 679 (1984).

presence, but it also limits police discretion to arrest for violation of the loitering law in the face of a truthful explanation of a legitimate purpose behind the actor's loitering. However, these laws include no guidelines under which the sufficiency of an explanation may be assessed. Without guidelines, law enforcement officers are free to follow what may be an intuition that the loiterer's presence warrants alarm and arrest regardless of the actor's explanation. As in *Kolender v. Lawson*,[152] the discretion bestowed upon law enforcement officers to determine the sufficiency of the actor's explanation "necessarily 'entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat.'"[153] As such, a "satisfactory explanation" clause by no means provides a guaranteed check on police discretion to arrest for loitering in "alarming" circumstances.

The question then arises whether either lawmakers or courts can formulate constitutionally adequate guidelines that would restrict police discretion in evaluating the sufficiency of an explanation of one's presence and conduct.[154] In light of the breadth of circumstances to which these laws might apply, it is difficult to conceive of a set of guidelines that could be utilized by police officers to evaluate all potential explanations offered during a stop. While the United States Supreme Court has declared that "due process does not require 'impossible standards' of clarity,"[155] it would be antithetical to suggest that a law that is so broad that guidelines for enforcement cannot possibly be drawn must, by virtue of the scope of circumstances it attempts to address, fulfill the requirements of the void-for-vagueness test.[156] Rather, this class of loitering laws must fall to the due process standards of the fifth and fourteenth amendments.[157]

More narrowly drawn loitering laws, on the other hand, will almost certainly continue to be upheld in the face of void-for-vagueness challenges. However, both *People v. Bright*[158] and *People v. Superior Court (Caswell)*[159] address notable concerns that will continue to play a role in the evaluation of narrowly drawn loitering laws.

As the court in *People v. Bright* emphasized, a law that prohibits loitering in a specifically restricted place, not open to the public, where illegal activity is notorious is likely to be held constitutional.[160] Under such a law, citizens are put on notice by the very nature of the facility that loitering is prohibited. When construing statutes and ordinances that prohibit loitering in a particular space, courts must take note of

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152. 461 U.S. 352 (1983).

153. Smith v. Goguen, 415 U.S. 566, 575 (1974) (quoting Gregory v. Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring)), *cited in Kolender*, 461 U.S. at 360.

154. According to the cases, no court has attempted to formulate guidelines for the evaluation of an explanation offered pursuant to a stop under a law based on MODEL PENAL CODE § 250.6.

155. *Kolender*, 461 U.S. at 361 (quoting United States v. Petrillo, 332 U.S. 1, 7–8 (1947)).

156. The same problems are encountered when attempting to formulate guidelines for evaluating whether circumstances "warrant alarm for the safety of persons or property."

157. Though striking down this category of loitering laws would eliminate a valuable weapon in the police officers' arsenal, a wide array of laws prohibiting inchoate crimes are commonly available to aid law enforcement officials in their efforts to prevent crime, including laws prohibiting attempted crimes, solicitation, possession of illegal drugs, and other, more narrowly-drawn loitering laws.

158. 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988).

159. 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988).

160. People v. Bright, 71 N.Y.2d 376, 384, 520 N.E.2d 1355, 1359, 526 N.Y.S.2d 66, 70 (1988).

these considerations. Although mere presence within the restricted facility is prohibited without regard to the actor's intent, these laws use the nature of the facility itself as a predictor that those who loiter within its boundaries are there for a criminal purpose. Courts must therefore be careful to uphold such laws only when such a prediction is reasonable. If the facility is open to the public or regularly attracts people who loiter for wholly legitimate ends, nothing inherent in the nature of the facility will alert the public at large to the prohibition against loitering. Under these circumstances, a loitering law will violate the first prong of the void-for-vagueness test since nothing will give people of ordinary intelligence notice that their presence or actions are prohibited.

The New York Court of Appeals' conclusions in *Bright* should also alert courts that it is time to reassess the validity of laws prohibiting loitering within specific facilities where the nature of the facilities has changed so much that they can no longer be considered "restricted." Where this is so, there may be nothing to alert the public to the prohibition against loitering, and the laws may be used as a trap against "undesirables." In these cases, loitering laws encompassing such facilities should be limited to other restricted places or held void for vagueness.

Notwithstanding the Virginia Court of Appeals decision in *Coleman v. City of Richmond*,[161] laws that prohibit loitering for a specific illegal purpose are also likely to survive constitutional scrutiny. As the Supreme Court of California points out in *People v. Superior Court (Caswell)*,[162] the questions that are likely to arise under these laws are apt to pertain to the existence of probable cause for arrest in a particular case, rather than the constitutionality of the statute under which the arrest was made.[163] Here, guidelines can help to specify conduct from which a police officer may infer the required intent. Such guidelines, however, are not constitutionally mandated. Instead, the scienter requirement included in these laws serves to limit police discretion in enforcement and to notify the public that loitering for the specified illegal purpose is prohibited.

VI. Conclusion

Loitering laws can be an effective weapon to combat crime, but they are not a panacea. When properly limited in scope, they can help police officers perform that part of their job that is probably most difficult, but also most meaningful to society—crime prevention. Legislatures cannot, however, relinquish control over lawmaking in this area by providing police with unlimited power to arrest those whose conduct is deemed "suspicious." Under such circumstances, the Constitution mandates that courts step in and limit police officers' discretion to enforce the laws of the state or municipality.

Jordan Berns

161. 5 Va. App. 459, 364 S.E.2d 239, *reh'g denied*, 6 Va. App. 296, 368 S.E.2d 298 (1988).
162. 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988).
163. *Id.* at 394, 397, 758 P.2d at 1052, 1054, 250 Cal. Rptr. at 521, 523.